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(2)

No. 84-1153

IN THE

SUPREME COURT OF THE UNITED STATES

JACK OTTO, Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR RECONSIDERATION OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALAN ELLIS, Member of the Bar
of the Supreme Court and
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TABLE OF CONTENTS

	Page
QUESTION JUSTIFYING RECONSIDERATION	1
ARGUMENT SUPPORTING THE GRANT OF RECONSIDERATION	2
CONCLUSION	6

TABLE OF CITATIONS

	Page
Evitts v. Lucy, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 35 Cr.L. 3109 (1985)	1, 2, 3, 4
Rodriguez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed. 340 (1969)	4

QUESTION JUSTIFYING RECONSIDERATION

I. Should this Honorable Court reconsider the denial of Mr. Otto's petition for certiorari in light of the decision in Evitts v. Lucy, infra, decided less than a week after the filing of the instant petition?

ARGUMENT SUPPORTING THE GRANT OF RECONSIDERATION

Mr. Otto seeks reconsideration of the denial of his petition for certiorari in light of the decision in the recent case of Evitts v. Lucy, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d___, 35 Cr.L. 3109 (1985), decided less than one week after the instant petition for certiorari was filed.

While it is true that Evitts v. Lucy, supra, dealt with stipulated ineffective assistance of counsel on direct appeal, several principles were set forth in that case which apply to and should control Mr. Otto's case as well.

In Evitts v. Lucy, supra, this court reaffirmed the principle that all defendants have a right to a first appeal which is adequate and effective. Mr. Otto has not been afforded this in spite of

posturing his case in the district court expressly for that appeal. In Evitts v. Lucy, supra, this court stated at note 6 that where an attorney's procedural default causes the dismissal of an appeal, it is tantamount to having no counsel at all. This court also stated that as far as a direct appeal is concerned, the services of an attorney will be necessary for practically all laymen. Here, Mr. Otto did not have the services of any attorney. If he had, the filing fee would have been paid in this matter and the whole problem eliminated. Additionally, it is again pointed out the lower court failed to comply with the mandates of F.R.Crim.P. 32(a)(2), regarding appointed counsel and the in forma pauperis procedures.

Finally, in a broader sense, Evitts v. Lucy must also be seen as a reaffirmation of the principle that a timely filed and

otherwise valid appeal should not be dismissed on the basis of a minor procedural default. The proper, more expeditious and least costly remedy was suggested in Evitts v. Lucy, supra, at note 10 where it cites Rodriguez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969), and outlines the simple process of vacating the sentence, and remanding for reimposition of sentence, thus paving the way for a new and properly filed appeal. Mr. Otto has consistently sought this at every level as the minimum relief to which he is entitled.

This Honorable Court simply cannot permit this injustice to go uncorrected, and indeed, under Evitts v. Lucy, supra, it should not. Mr. Otto lost his appellate rights for the mere non-payment of a $70 filing fee. Those rights should be restored, especially where he has

consistently claimed he has never received notice of the impending dismissal prior to that actual dismissal.[1]

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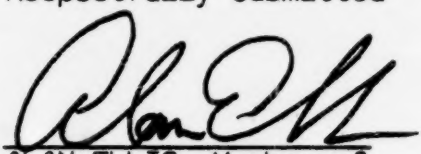
[1]Mr. Otto renews his request to this Honorable Court to obtain the record compiled in the Eleventh Circuit. The entire record is less than 200 pages, and is easily mailable. In fact, the Eleventh Circuit mails it to counsel of record for use in the preparation of the brief on the merits in that court. As Mr. Otto has consistently represented, the notices of pending dismissal alleged to have been received by him are not present in this official record. Mr. Otto sought to invoke Supreme Court Rule 19 to have this record sent to this court as a matter of course, but was informed that the record in the lower court is requested only if a particular Justice of this Honorable Court makes that request. This Honorable Court simply must not make a final decision on this matter without at least looking at the lower court record.

CONCLUSION

Wherefore, for the above-cited reasons and circumstances, the petitioner, Jack Otto, respectfully requests this Honorable Court grant his motion for reconsideration, and grant his petition for certiorari. Upon granting said petition for certiorari, Mr. Otto further requests this Honorable Court summarily vacate his sentence and remand to the United States District Court for the Northern District of Georgia for resentencing, or in the alternative, issue a briefing schedule consistent with this court's business.

Respectfully submitted



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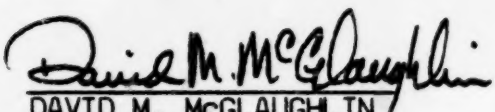

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